85-530

No.

Supreme Court, U.S.
FILED
SEP 25 1985
JOSEPH F. SPANIOL, JR.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

DENNIS M. O'CONNOR, et. al.,
Petitioners,

VS.

MAGNO J. ORTEGA,
Respondent.

On Writ of Certiorari to the United States Courts of Appeal for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether it is a violation of a government employee's civil rights for government officials to make an administrative inventory of papers in a government office assigned to him while he is undergoing an administrative investigation.

(2) Whether the Court of Appeals erred in granting summary judgment to appellant and remanding to the District Court only on the issue of damages when petitioners had the right to have a jury decided whether or not they were justified in asserting a government official's "good faith defense" to their actions.

LIST OF PARTIES

Petitioners: Dennis M. O'Connor; Richard Friday; Dorothy Owen; Stefan Donoviel

Respondent: Magno J. Ortega

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 764 F.2d 703 (1985), and is set forth at Appendix A-1 to A-7. The Judgment of the United States District Court for the Northern District is not reported, and is set forth at Appendix A-8.

JURISDICTIONAL GROUNDS

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on June 27, 1985. The decision of the U.S. Court of Appeals is now final. A petition for writ of certiorari is due on or before September 25, 1985.

This Court has jurisdiction to review the lower decision by writ of certiorari under 28 U.S.C. § 1254(3).

APPLICABLE FEDERAL LAWS

1. United States Constitution, Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. 42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

1. Nature of the Controversy

Magno J. Ortega sued four officials of the Napa State Mental Hospital of the State of California for violation of his civil rights when they made an administrative entry into his locked office located on hospital premises without a search warrant. Dr. Ortega ("respondent") had been a psychiatrist at Napa State Mental Hospital ("Napa") for seventeen years, and had been assigned his office on Napa premises in his capacity as Chief of Professional Education. He had been under a personnel investigation since July 30, 1981 for his management practices, questionable

acquisition of a computer, and sexual harassment of female employees.

On or about July 31, 1981 respondent had been informed by Dr. Dennis M. O'Connor ("O'Connor"), Executive Director, that he was under investigation by Napa. He was ordered by letter to stay off hospital grounds unless he received written approval. Respondent requested and received two weeks vacation leave starting that July 31st. On August 14, 1981 respondent was informed that he would be placed on administrative leave with pay since the investigation was not complete.

On August 17, Dr. O'Connor was informed by a member of the Napa staff that a computer which he believed was state property had been removed from the Napa premises by respondent. Dr. O'Connor was further informed that respondent had called his secretary to inform her that he had entered the Napa premises that weekend to remove the computer.

Shortly thereafter, as part of an order by Dr. O'Connor to investigate the matter, four Napa employees including Richard Friday ("Friday") opened respondent's locked office on the Napa premises to determine what records and other State property was there. Three personal items involving a female medical resident were removed as relevant to the pending personnel investigation against the respondent. One of the state employees made several attempts to sort through the items in the office trying to separate and identify State property from other items. Finding the task impossible, he eventually boxed up the contents of the office and placed them in a locked room for the doctor to pick up.

As a result of a hearing before the California State Personnel Board, appellant was terminated from his position at Napa as of September 22, 1981, and he did not return to Napa (See Appendix A-9 to A-15).

Respondent filed his action in the District Court based on federal causes of actions under 42 U.S.C. § 1983.

2. The Proceedings Below

In the District Court petitioners and respondent filed cross motions for summary judgment.[1] Petitioners raised three issues: 1) that prosecutorial immunity applied to one defendant; 2) that respondent was barred from raising pendent State claims for failure to comply with the claims requirements of the California Torts Claims Act (Govt. Code §§ 810 *et seq.*); and 3) that respondent had no reasonable expectation of privacy as a government employee in a government office on government property; and that the State had the right to conduct an administrative inventory of his office in order to identify and protect State records and property.

Respondent's motion argued that there had been an unreasonable search of his office, an unreasonable seizure of his property, and consequently his civil rights had been violated. He further argued that his pendent tort claims were not barred for failure to comply with the California Torts Claim Act.

The District Court granted summary judgment to petitioners on all three issues. It issued a judgment but no written opinion. The transcript of the proceeding at the trial court indicates that the court concluded that the search was reasonable under the fourth amendment, that prosecutorial immunity applied to defendant Rubin, and that respondent's claims were barred. Respondent appealed the trial court's decision to the United States Court of Appeals on the issues of whether his civil rights had been violated and whether his pendent claims were barred.

The Ninth Circuit took a *de novo* review of both motions for summary judgment in *Ortega v. O'Connor* (1985) 764 F.2d 703. It affirmed the lower court decision with respect to the pendent state claims, but reversed on the issue of the reasonableness of the search under the circumstances of the case.

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[1] The original complaint named as an additional defendant Asher Rubin, Deputy Attorney General for the State of California. He was dismissed from the suit by the District Court on the grounds that he was entitled to prosecutorial immunity. His dismissal was not appealed by respondent.

The Court of Appeals' opinion found that, under the facts of the case, respondent had a subjective expectation of privacy, and said expectation was reasonable. The petitioner's actions were viewed as a violation of respondent's rights under 42 U.S.C. §1983.

The Court of Appeals ruling that it was a violation of a government employee's civil rights for government officials to attempt to make an administrative inventory of State property and records contained in a government office is in conflict with decisions by the United States Courts of Appeals for the Fifth Circuit (*Williams v. Collins* (8th Cir. 1984) 728 F.2d 721); the Seventh Circuit (*United States v. Nasser* (7th Cir. 1973) 476 F.2d 1111) and the Second Circuit (*United States v. Collins* (2nd Cir. 1963) 349 F.2d 863). Petitioners allege that respondent did not have a reasonable expectation of privacy, and the administrative search was reasonable under the factual circumstances.

ARGUMENT
I
INTRODUCTION

The facts in this case are a case of first impression for the Court of Appeals of the Ninth Circuit, but the issues have been dealt with in other circuits. The successful operation of government agencies rests in part on their ability to implement effective administrative controls over government records and property within their areas of responsibility. The Court of Appeals' decision would hamper officials' abilities to carry out government responsibilities effectively in the event that an internal personnel crises makes it necessary for supervisorial officials to investigate and determine the whereabouts of government property or records. The threat that considered, well-intentioned official actions on government premises concerning government property would lead to a lawsuit for violations of an employees' civil rights will intimidate and deter government officials in the proper, effective implementation of their work responsibilities. The recognition of the necessity for work-related investigations of individual employee work-areas was recognized in *United States v. Nasser,*

supra 476 F.2d 1111; *United States v. Collins, supra,* 349 F.2d 863; *Williams v. Collins, supra* 728 F.2d 721.

Petitioners further assert an argument not raised below with respect to the granting of respondent's motion for summary judgment. Petitioners contend that the Court of Appeals should not have granted respondent's motion for summary judgment on the issue of violation of his civil rights even if it overturned petitioner's motion. Petitioners submit that they are entitled to have a jury decide if they acted within the scope of their discretion, in good faith, with due care and in reasonable good faith belief that they were following the law; in effect whether the qualified immunity available to government officials applies to their actions. (See *Butz v. Economou* (1978) 438 U.S. 478; *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 814; *Wallace v. Chappell* (9th Cir. 1981) 661 F.2d 719; *Sellars v. Procunier* (9th Cir. 1981) 641 F.2d 1295.)

II
THE PLAINTIFF'S EXPECTATION OF PRIVACY IN A GOVERNMENT OFFICE WAS UNREASONABLE

This Supreme Court has held that the individual's ability to involve the Fourth Amendment against unreasonable search and seizure depends "not upon a property right in the invaded place but whether the area was which there was a reasonable expectation of freedom from government intrusion." *Mancusi v. DeForte* (1968) 392 U.S. 364, 368; See *Katz v. United States* (1967) 389 U.S. 347, 352. Later decisions, however, have made it clear that "not all privacy interests which a person asserts are constitutionally protected." *Chenkin v. Bellevue Hosp. Ctr. N.Y.C. ETC.* (S.D. New York 1979) 479 F.Supp. 207, 211. In several instances and under appropriate circumstances the expectation of privacy has been considered unreasonable and outweighed by public or government interests. (See *United States v. Nasser supra,* 476 F.2d 1111, 1123; *United States v. Collins supra,* 349 F.2d 863, 868; *Chocallo v. Bureau of Hearings and Appeals, SSA* (E.D. Pa. 1982) 548 F.Supp. 1349, 1364; *Chenkin v. Bellevue Hosp. Ctr., N.Y.C. ETC., supra,* at p. 212, 215.)

Thus, the Court of Appeals for the Fifth Circuit held in *Williams* that the expectation of privacy in a government furnished desk was not reasonable when a job-related investigation or office inventory was undertaken by plaintiff's supervisors (at p. 728). A similar work-related surveillance was upheld in *United States v. Nasser, supra,* 476 F.2d 1111, 1123 the Court holding that the IRS had the right "to determine whether its work was being properly performed by an IRS employee in the areas assigned to him for the purpose" for such work.

Several Federal District Courts have also recognized situations where the reasonabable governmental need outweighs the individual's privacy. In *Chenkin v. Bellevue Hosp, Ctr., N.Y.C. ETC., supra,* 479 F.Supp.2d 7, 211, the search of a hospital employee's knapsack as part of a hospital policy to reduce the serious pilferage of hospital supplies was upheld. The Court stated that the expectation of privacy had not been reasonable since the public's interests in controlling pilferage from public hospitals was substantial and legitimate (at p. 214). Likewise, in *Chocallo v. Bureau of Hearings and Appeals, SSA, supra,* at 548 F.Supp. 1349, an administrative entry by government employees into a locked government office to retrieve government files was held not a violation of search and seizure. Plaintiff's expectation of privacy was considered unreasonable and the need of her supervisors to locate government property was overriding.

Critical to petitioners' position in the Court of Appeals is the issue of whether respondent had a "reasonable expectation of privacy". In the Court of Appeals, respondent reiterated that he considered his office private. Cited in support of his position is his long occupancy of the particular office and "his" own belief that he had the only key to his office. Ignored and unmentioned in his recitation of facts is that he was a public employee at all times during his occupancy of the office, that the office was a government office on the premises of Napa, a State-owned hospital, and that he had use of that office because he had responsibilities to Napa. Furthermore, as part of respondent's responsibilities, he frequently had the records and files of medical residents in his office as well as other State property.

Given the fact that respondent was a government employee in a government office, his own belief that this was his private office was not reasonable. In *Chocallo v. Bureau of Hearings and Appeals, SSA* (supra), 548 F.Supp. 1349, the court found that a plaintiff's assertion that her office in a privately-owned building was private was not persuasive since she was a public employee and her office space was government owned or leased. Even the fact that she had installed her own lock was considered irrelevant in determining if her expectation of privacy was reasonable (at p. 1363-1364). In light of the findings in *Chocallo,* respondent's contention that his office was private is even less persuasive since his assigned office was part of the Napa premises.

Petitioners respectfully contend that the Court of Appeals decision in the instant matter misapplied the law to the instant fact situation. Courts of Appeals and District Courts in other regions have recognized the need for reasonable government intrusion in government offices, desks, or work areas outweighing the right of the individual need to privacy in the government work place. Petitioners respectfully request this Court to overrule the decision of the Court of Appeals in this issue.

III

THE ADMINISTRATIVE INVENTORY BY GOVERNMENT OFFICIALS WAS NECESSARY AND REASONABLY CONDUCTED

Petitioners' entry into respondent's office was a reasonable administrative investigation, reasonably conducted under the circumstances of the instant case. Consideration should be given to the three-prong test applied in *Chenkin v. Bellevue Hosp. Ctr., N.Y.C., ETC, supra,* 479 F.Supp. 207. Consideration is given to the strength of the public necessity for the search; the efficacy of the search; and the degree and nature of the intrusion upon the individual (at p. 213). In *Chenkin* the Court found a strong public necessity in the need to protect public property in a major hospital institution. In other cases work-related investigations conducted in an effort to maintain the operation of government entities have been recognized as public necessity justifying ad-

ministrative entities. In *Chocallo v. Bureau of Hearings and Appeals, SSA, supra,* 548 F.Supp. 1349, the right of government employees' into plaintiff's locked office was upheld as work-related, a reasonable examination by government officials to ascertain the whereabouts of a file. In *Williams v. Collins, supra,* 728 F.2d 721, the Court stated plaintiff's government supervisors did not exceed their authority by entering his office and locked desk and temporarily seizing his personal items. The Court stated that the entry would have been reasonable either as part of the investigation of plaintiff's job performance or as part of an office inventory.

In the instant matter petitioners initiated their actions because there was an established hospital policy to inventory property within offices of departing or terminated employees to determine which property was State property and which was personal. The necessity of this inventory was particularly pressing because of concern about the previous entry by respondent into Napa property and removal of the computer. Such a search was further reasonable since it was respondent's management practices which were under investigation, and Napa files and records related to respondent's supervisorial responsibilities would forseeably be kept in his office. The respondent's items were removed as efficaciously as possible under the facts, with as minimal an intrusion as possible into respondent's property.

Petitioners contend that the Court of Appeals wrongly decided that the administrative inventory was unreasonable in light of the facts. The supervising officials were legitimately alarmed about the missing computer, and reasonably concerned about the possibility of other Napa files and property which might be located in respondent's office in his capacity as the Chief of Professional Education at Napa. The hospital's need to identify and safeguard Napa files and other property was a sufficiently important governmental interest that should have overridden respondent's expectation of privacy.

IV

IF THE COURT OF APPEALS REVERSED THE DECISION FOR THE PETITIONERS, THE CASE SHOULD HAVE BEEN REMANDED FOR TRIAL

Even assuming for argument's sake that petitioners motion for summary judgment was correctly overturned, the Court of Appeals was incorrect in granting respondent's motion for summary judgment. Petitioners contend that the Court of Appeals decision deprived petitioners of their right to assert a government official's qualified immunity, or "good faith defense" to defend actions undertaken as part of an administrative investigation. See *Butz v. Economou* (1978) 438 U.S. 478; *Harlow v. Fitzgerald* (1982) 457 U.S. 800; *Wallace v. Chappell* (9th Cir. 1981) 661 F.2d 719; *Sellars v. Procunier* (9th Cir. 1981) 641 F.2d 1295.

A qualified immunity has been applied to officials because it was considered unfair to subject them to liability for good faith actions based on information that later turned out to be incorrect or was made under the press of time. See *Sellars v. Procunier, supra,* 641 F.2d 1295. In a footnote to its opinion in the instant case the Court of Appeals implicitly recognized the good faith motives of the Napa official.[2]

The decision of the Court of Appeals has an intimidating effect on the well-intentioned efforts of government officials to carry out their supervisorial and administrative responsibilities. The decision undermines the strength and value good faith immunity since the officials who commit an error but do not violate a clear,

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[2] The relevant footnote, produced in full, stated:
"The motivation for the search of Ortega's is distinguishable from that in *Gillard,* which was the result of an angered school board member's desire to ascertain the authorship of political cartoons in a newspaper. 579 F.2d at 826. The search of Ortega's desk was apparently motivated by concern with the whereabouts of a computer and by the impending investigation of Ortega. We do not believe, however, that any distinctions that can be made between the motivations behind these two searches are relevant when determining the reasonableness of Ortega's expectation of privacy." (at p. 706.)

constitutional right or procedure are subjected to liability when they acted in a well-intentioned manner to protect legitimate government interests. In view of the fact that even the Court of Appeals did not deem any of the petitioners ill-intentioned or malicious, the case should have been remanded to the trial court for consideration of this issue.

CONCLUSION

This case raises significant federal issues that were wrongly decided below. The Court of Appeals has seriously inhibited the ability of government officials to carry out their supervisorial and administrative duties in times of internal administrative crisis. It further has undermined the validity of an important and long-recognized immunity, the existence of which encourages government officials to perform their duties without fear of unreasonable or harassing lawsuits. This Court should accordingly grant the petition for writ of certiorari.

Respectfully submitted,

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(Appendices follow)

Appendix 1

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 84-2169
USDC NO. C-82-4045-JPV

Magno J. Ortega,
Plaintiff-Appellant,
vs.
Dennis M. O'Connor, Exectuve Director, Napa State Hospital;
Richard Friday, Business Manager, Napa State Hospital,
Dorothy Owen, Personnel Officer, Napa State Hospital;
Stefan Donoviel, etc., et al.,
Defendants-Appellees.

OPINION*

[Filed June 27, 1985]

Argued and Submitted: April 11, 1985—San Francisco

Appeal from the United States District Court
for the Northern District of California
Hon. John P. Vukasin, District Judge Presiding

Before: Schroeder, Nelson and Reinhardt, Circuit Judges.

Nelson, Circuit Judge:

Magno Ortega appeals the district court's grant of summary judgment against him in an action alleging claims under 42 U.S.C. § 1983 and state law. We reverse and remand with respect to Ortega's section 1983 claim and affirm the grant of summary judgment against Ortega on his pendent state claims.

FACTS AND PROCEDURAL HISTORY

Ortega, a state licensed physician and psychiatrist, held the position of Chief of Professional Education at Napa State Hospital ("Napa"), a public institution operated and owned by the State of California. In July 1981, Ortega became the subject of an investigation into the management practices of his department.

Dennis O'Connor, Executive Director of Napa, asked Ortega to take vacation leave during the investigation and not to return without O'Connor's written approval. Upon expiration of Ortega's vacation, O'Connor placed Ortega on administrative leave pending completion of the investigation. The investigation concerned the propriety of the acquisition of a computer and sexual harassment charges.

On August 17, 1981, a hospital staff member informed O'Connor that Ortega had told his secretary that he had taken the computer to his home. O'Connor apparently believed that the computer belonged to the hospital, though in fact, Ortega had acquired the computer with his own funds and with funds donated by resident physicians. Although Ortega routinely took the computer home over weekends, O'Connor became concerned and directed four hospital officials to enter Ortega's office and investigate the matter.

Upon entering Ortega's office, the investigating officials attempted to sort through the items that they found, which included many of Ortega's personal belongings and papers. The officials took some of the items for use in the ongoing investigation of Ortega. The lock on the door to Ortega's office was changed, and Napa personnel eventually removed the items from the office for storage in a special locked area, where they were available for Ortega to pick them up.

The office, located on Napa's campus, had been assigned to Ortega in his capacity as Chief of Professional Education. Ortega had occupied the office for seventeen years and his name was on the door. He alleged that he kept the office locked at all times when he was not in it and was the only person who had a key. Ortega believed that no one else had ever entered his office without his permission during his tenure. Napa contends that the investigating officials believed that the computer was state property and that they believed that state records and files in Ortega's office needed protection. The computer, however, was not kept in Ortega's private office, but in an adjacent room, and the state records and files were located in the secretaries' office.

Napa contends that established hospital policy was to inventory property in the offices of departing or terminated employees to determine which property was state property and which was personal. At the time the officials entered his office, however, Ortega had neither been terminated nor was he scheduled to depart: he was merely on administrative leave pending completion of the investigation. Nothing in the record suggests that inventory procedures were conducted on a regular basis. Ortega, furthermore, was never informed that his office could be entered at any time and investigated. The investigation subsequently led to Ortega's termination in October 1981.

Ortega thereafter filed this section 1983 action alleging violation of his fourth amendment right to be free from unreasonable governmental intrusion. He also attached pendent state claims for invasion of privacy and breach of covenant of good faith and fair dealings. Prior to trial, both Ortega and the state defendants moved for summary judgment. The district court granted the defendants' motion, concluding that the search was reasonable under the fourth amendment and that the state causes of action were barred by Ortega's failure to comply with the California Torts Claims Act.

DISCUSSION

(a) Standard of Review

We review the district court's grant of summary judgment de novo to determine whether, viewing the facts in the light most favorable to the nonmoving party, there is any genuine issue of material fact and whether the substantive law was correctly applied. *Greenfield v. Kootenai County,* 752 F.2d 1387, 1388 (9th Cir. 1985).

(b) Section 1983 Claim

Ortega's section 1983 claim is grounded in the fourth amendment protections against unreasonable searches and seizures. The ability to invoke those protections depends "not upon a property right in the invaded place but [upon] whether the area was such that there was a reasonable expectation of freedom from government intrusion." *Katz v. United States,* 389 U.S. 347, 352 (1967).

Not all privacy interests asserted are constitutionally protected, however. *See United States v. Roberts,* 747 F.2d 537 (9th Cir. 1984). Fourth amendment privacy analysis involves both a subjective and an objective component: a party invoking fourth amendment protection must have a subjective expectation of privacy and society must be prepared to recognize and protect such an expectation as reasonable. *See United States v. Pollock,* 726 F.2d 1456, 1465 (9th Cir. 1984); *United States v. Bunkers,* 521 F.2d 1217, 1219 (9th Cir.), *cert. denied,* 423 U.S. 989 (1975).

As the Chief of Professional Education, Ortega dealt routinely with medical residents and professional staff. He worked in an office secured by a locked door, with a desk containing personal papers and files.[1] Furthermore, as a physician and psychiatrist, Ortega possessed sensitive and confidential information about patients or people with whom he dealt. In the seventeen years that Ortega occupied the office, the office had never been entered without his permission. Office inventories were apparently reserved for employees who were departing or were terminated. When Ortega's office was searched, he was neither scheduled to depart nor had he been terminated. These facts suggest that Ortega had a subjective expectation of privacy in his office that society is prepared to recognize and protect as reasonable. *See Bunkers,* 521 F.2d at 1219; *cf. Mancusi v. DeForte,* 392 U.S. 364, 368-69 (1968) (union official, even though he shared office, was

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[1] Ortega claims the following were searched and seized by Napa:

(a) Purely personal correspondence from friends and family.

(b) Photographs of friends, acquaintances, and family.

(c) Medical files and correspondence from private patients unconnected to Napa State Hospital.

(d) Appointment books and personal notes, as well as official appointments.

(e) Personal financial records and accounts.

(f) A file approximately 18 feet long of IBM cards containing teaching aids and notes.

(g) Personal souvenirs, gifts and presents belonging to Ortega.

(h) Copyrighted manuscript.

entitled to expect that records would not be taken from his office without his permission).

In *Gillard v. Schmidt*, 579 F.2d 825, 829 (3d Cir. 1978), the Third Circuit, confronting a similar situation, held that a school guidance counselor had a reasonable expectation of privacy in his desk. *Gillard* involved a search of a guidance counselor's desk, which was located in one large room that had been partitioned into five smaller offices. 579 F.2d at 826. The court's finding of a reasonable expectation of privacy rested, in part, on the sensitive nature of information likely to be found in a guidance counselor's files. 579 F.2d 828.[2] Here, Ortega's office possessed even more indicia of an expectation of privacy than did the desk in *Gillard:* Ortega's name was on the door; the office was kept locked and Ortega believed he possessed the only key; Ortega had occupied the office for seventeen years; and no policy provided for inspections of employees' offices. Ortega's office, moreover, was likely to contain sensitive and confidential information about Ortega's patients, as well as personnel files. *See also United States v. Speights*, 557 F.2d 362, 363 (3d Cir. 1977) (police officer had reasonable expectation of privacy in police-issued locker secured by police lock and personal lock, even though locker was owned by police department and supplied primarily for storage of police equipment).[3]

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[2]The motivation for the search of Ortega's office is distinguishable from that in *Gillard*, which was the result of an angered school board member's desire to ascertain the authorship of political cartoons in a newspaper. 479 F.2d at 826. The search of Ortega's desk was apparently motivated by concern with the whereabouts of a computer and by the impending investigation of Ortega. We do not believe, however, that any distinctions that can be made between the motivations behind these two searches are relevant when determining the reasonableness of Ortega's expection of privacy.

[3] Napa's efforts to distinguish *Gillard v. Schmidt*, 579 F.2d 825 (3d Cir. 1978), and *United States v. Speights*, 557 F.2d 362 (3d Cir. 1977), by characterizing the search of Ortega's office as a routine administrative search are unpersuasive. It is clear that Ortega was still a Napa employee when his office was searched, and there is no evidence in the

The circumstances of Ortega's case are distinguishable from those in decisions finding no objective expectation of privacy in the workplace, because Napa had no general inspection policy. In *United States v. Bunkers*, 521 F.2d 1217 (9th Cir. 1975), for example, a postal employee could claim no objective expectation of privacy in a locker because well-publicized regulations informed postal employees that lockers were subject to search as part of an effort to combat pilferage and stealing. *Id.* at 1219. Similarly, in *United States v. Collins*, 349 F.2d 863 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966), the court upheld a search of a Customs service employee's jacket for a stolen emerald where Customs employees were aware of the possibility of searches and where such searches occurred regularly. 349 F.2d at 867-68. *See also Chenkin v. Bellevue Hospital Center, New York City Health & Hospital Corporation*, 479 F. Supp. 207 (S.D.N.Y. 1979) (hospital's publicized policy of random inspection of parcels at hospital exits, designed to control pilferage, did not violate fourth amendment).

Here, Napa had never instituted surveillance or searches and had no general inspection policy that might have defeated Ortega's expectation of privacy in his office. The entry into the office seems to have been for no other purpose than to secure evidence for use in the ongoing investigation of Ortega. We therefore reject Napa's contention that Ortega's expection of privacy in his office was unreasonable.[4] We conclude that the search of Ortega's office was not a reasonable search under the fourth amendment.

The record in this case justifies a grant of partial summary judgment for Ortega on the issue of liability for an unlawful

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record showing that Ortega knew of any policy providing for inspection of his office.

[4] Napa's reliance on *Williams v. Collins*, 728 F.2d 721 (5th Cir. 1984), for the proposition that Ortega had no expectation of privacy in his office is unjustified. *Williams* is not relevant to our inquiry here, because it considered only whether the defendants had exceeded their authority and thereby lost their statutory immunity; it did not address fourth amendment requirements.

search; we will therefore remand to the district court for an entry of judgment in favor of Ortega and for a hearing to determine the amount of damages. *See Gillard v. Schmidt,* 579 F.2d 825, 829 (3d Cir. 1978); *see also International Longshoremen's & Warehousemen's Union v. Kuntz,* 334 F.2d 165, 171 (9th Cir. 1964).

(c) Pendent Claims

Ortega urges this court to accept his assertion that his pendent state claims should be excused from meeting the requirements of the California Torts Claims Act. The applicable statutes condition the right to sue the state upon timely filing of claims. This court has held that failure to comply with state-imposed procedural conditions to sue the state bars the maintenance of a cause of action based upon these pendent state claims. *See Willis v. Reddin,* 418 F.2d 702, 704 (9th Cir. 1969). Cal. Gov't Code § 905.2 states that a claim must be presented for "all claims for money or damages against the state," including claims for "money damages (1) on express contract, or (2) for an injury for which the state is liable" in accordance with the code. Ortega failed to file a claim with the State Board of Control as required by Cal. Gov't Code § 905.2 and his claim is now barred by the statute of limitations. Cal. Gov't Code §§ 911.2, 911.4. Ortega is therefore barred from pursuing his state-law claims.

CONCLUSION

We affirm the grant of summary judgment against Ortega on his pendent claims and reverse and remand with instructions to grant Ortega summary judgment and determine damages on his section 1983 claim.

Appendix 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C-82-4045 JPV

Magno J. Ortega
v.
Dennis M. O'Connor, et al.

JUDGMENT

[Filed May 30, 1984]

In accordance with the Order of May 23, 1984,

IT IS HEREBY ADJUDGED that Summary Judgment is granted in favor of defendants, and this action is dismissed.

Dated: May 29, 1984

/s/ J. P. VUKASIN
J. P. Vukasin
United States District Judge

Appendix 3

CALIFORNIA STATE PERSONNEL BOARD

[Letterhead]

Case No. 13418

In the matter of the Appeal by
MAGNO J. ORTEGA
From dismissal from the position of
Chief of Professional Education, Mental
Hospital, at Napa State Hospital,
Department of Developmental Services
at Imola

DECISION

WHEREAS, the State Personnel Board has considered carefully the findings of fact and Proposed Decision filed by the Hearing Officer in the above matter; and

WHEREAS, by said Proposed Decision the appeal is denied;

IT IS RESOLVED that the findings of fact and Proposed Decision of the Hearing officer in said matter are hereby adopted by the State Personnel Board as its decision in the case.

* * *

I hereby certify that the State Personnel Board made and adopted the foregoing resolution, and I further certify that the attached is a true copy of the Hearing Officer's Proposed Decision adopted by the State Personnel Board in Case No. 13418 on March 17, 1982.

RONALD M. KURTZ
Ronald M. Kurtz,
Executive Officer,
State Personnel Board.

BEFORE THE STATE PERSONNEL BOARD
OF THE STATE OF CALIFORNIA

Case No. 13418

In the Matter of the Appeal by
Magno J. Ortega

From dismissal from the position of Chief of Professional Education, Mental Hospital, at Napa State Hospital, Department of Development Services at Imola.

PROPOSED DECISION

This matter came on regularly for hearing before James C. Waller, Hearing Officer, State Personnel Board, on October 29, November 16, 17, December 29, 30, 1981 and February 3, 1982 at Imola, California.

The appellant, Magno J. Ortega, was present without counsel.

The respondent was represented by George Deukmejian, Attorney General, by Asher Rubin, Deputy Attorney General.

Evidence having been received and duly considered, the Hearing Officer makes the following findings of fact and Proposed Decision:

I

The above dismissal effective September 22, 1981 and appellant's appeal therefrom comply with the procedural requirements of the State Civil Service Act.

II

The appellant has worked for the State since 1964 as the Chief of Professional Eductaion, Mental Hospital at Napa State Hospital. He supervised the Psychiatric Residency Program. The appellant is arrogant and has an abrasive personality. He did not get along well with the Hospital Executive Director or other Hospital Administrators. He demanded his own way at all times.

III

As cause for dismissal it is alleged that the appellant sexually harassed 2 female employees improperly placed a resident on leave without pay, requested that residents contribute money to purchase a computer and mislead the residents by promising that they would be given overtime work to cover their contributions when overtime work for such a purpose is not authorized. It is also alleged that the appellant deceived the Hospital Executive Director by telling him that the computer had been donated to the hospital and that the deception caused the Director to sign improper sub-purchase orders for computer parts. It is further alleged that the appellant took personal control of the computer and placed it in his home.

IV

In 1980 a young female student assistant worked in the Professional Library under the appellant's supervision. The appellant requested her telephone number, invited her to lunch, requested her to help him write a book, called her at home on the telephone and embarrassed her by putting his hands on her and by putting his arm around her. The student felt sexually harassed. She believed that she had to put up with the appellant's actions in order to insure her continued employment. She eventually overcame her fear and filed a complaint of sexual harassment.

V

During the 1978-79 academic year the appellant sexually harassed a female social worker at Napa State Hospital. He took her into an empty office, closed the door and attempted to kiss her. She refused his advances and was very embarrassed. During subsequent weeks he continued to harass her by asking to see her after class and suggesting that she might change her mind about his advances. He made her very uncomfortable. She also filed a complaint alleging sexual harassment.

VI

The State is interested in having an integrated data processing system. Rules have been promulgated that make it difficult for a Department to buy a separate computer or computer parts with State money. The appellant decided to circumvent all the studies and approvals required by the State Rules and Regulations. He asked the residents under his supervision to donate money for the purchase of a computer. He told the residents that he would authorize some form of overtime for each resident in order to have the State, in effect, repay the money they donated. Many of the residents made substantial cash contributions. The appellant purchased a computer. The appellant did not have authority to authorize overtime for such a purpose and it was never done. The residents were not reimbursed for their contributions. The residents were under the appellant's complete control and supervision. Requesting subordinates to contribute money for any cause is a form of coercion which cannot be condoned at a State institution.

VII

The appellant placed a Dr. Vaughan, a resident under his supervision, on unpaid leave for the month of July, 1981. The appellant told the Personnel Office that Dr. Vaughan had requested the leave. The appellant's statement was false. Dr. Vaughan had not requested leave. He had asked to work at Napa State Hospital that month rather than go to another location. Dr. Vaughan made the request to remain at Napa because his wife was having surgery. Dr. Vaughan did not know that his request to work at Napa had been denied or that the appellant had placed him on unpaid leave. Dr. Vaughan worked all month at Napa State Hospital and was shocked when he found that he would not be paid. He filed a grievance and was eventually paid. Dr. Vaughan contends that the appellant placed him in a non-pay status for the month of July because he refused to contibute to the computer and in fact told other residents that they should demand the return of their money.

VIII

In March, 1981 the appellant made arrangements for Mr. Paul Saeedi to demonstrate the computer he had acquired to the residents. Mr. Saeedi came to the hospital on seven different occasions and gave two hour classes. On June 30, 1981 the appellant submitted a contract for the State to pay Mr. Saeedi $1,800.00. The appellant violated State Rules and Policies by not obtaining prior approval of the contract and by agreeing to pay amounts in excess of the authorized rates for such services. The contract was later disapproved and Mr. Saeedi has not been paid.

IX

On April 15, 1981 the appellant requested the Executive Director of the Hospital to sign two sub-purchase orders for computer parts in the amount of $1,388.00. He told the Executive Director that a computer and printer had been donated to the hospital. The Executive Director signed the orders. The appellant mislead the Executive Director. The computer and printer had not been donated to the hospital and the computer parts were not being ordered. The parts had already been delivered. The appellant later took the computer to his home. The computer has never been donated to the hospital and it is not at this time hospital property.

X

During the hearing the appellant made repeated assertions that he was denied prehearing discovery. Those assertions are without merit. He was provided all relevant information and documents. On the other hand, the appellant steadfastly refused to comply with instructions to provide similar information to the Department.

* * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT THE HEARING OFFICER MAKES THE FOLLOWING DETERMINATION OF ISSUES:

The appellant's conduct violates the provisions of Section 19572 of the Government Code. The allegations set forth in the notice of dismissal were established by the evidence. The appellant's dismissal is warranted and should be sustained.

* * *

WHEREFORE IT IS DETERMINED that the dismissal taken by respondent against Magno J. Ortega effective September 22, 1981 is hereby sustained without modification.

* * *

I hereby certify that the foregoing constitutes my Propose Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

Dated: March 8, 1982

James C. Waller,
Hearing Officer
State Personnel Board

Appendix 4

CALIFORNIA STATE PERSONNEL BOARD

[Letterhead]

Case No. 13418

In the Matter of the Appeal by
Magno J. Ortega

From dismissal from the position of Chief of Professional Education, Mental Hospital, at Napa State Hospital, Department of Developmental Services at Imola.

DECISION ON PETITION FOR REHEARING

I hereby certify that by motion duly made, seconded and carried, the State Personnel Board on June 23, 1982 denied the Petition for Rehearing in the above matter.

DATED: June 23, 1982.

RONALD M. KURTZ
Ronald M. Kurtz
Executive Officer, State Personnel Board